IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 576

AUBREY HICKENBOTTOM, CLARENCE N. HUDSON, EARL E. BONSTEEL, F. L. COFFMAN and HERBERT L. GIPSON

Petitioners

vs.

W. J. McCAIN, ROLAND M. SHELTON, ROSS RICHESIN, Sheriff of Boone County, Arkansas; EULAN MOORE, Clerk of the Circuit Court of Boone County, Arkansas and HUGH BURLISON,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

REPLY BRIEF FOR PETITIONERS

CHARLES M. HAFT,
Attorney for Petitioners

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MAY IT PLEASE THE COURT:

POINT 1 OF RESPONDENTS BRIEF PAGE 1

We agree with counsel for respondents that July 10, 1944 is the date from which time for filing a petition for certiorari must be computed.

The language of Section 8, which controls the time of filing the petition herein provides that application for a writ of certiorari shall be made within three months after the entry of judgment. In as much as the law does not take note of the fractions of a day, July 10th is not to be counted as part of the three month period, but conversley it is to be excluded.

Burnett vs Willingham Loan etc 282 U. S. 437.
U. S. vs. Hardy 74 Fed. 2nd 841.
Pillsbury vs Alaska Packers Asso. 78 Fed. 2nd 587.
Wheeler vs Lumbermans Mutual 6 Fed Supp 532.
The Leopard 1 Fed. Supp. 219.
U. S. vs Beaman 61 Fed. 2nd 493.
Creasy vs U. S. 4 Fed. Supp. 475.

The petition was filed herein October 10th, 1944 and was therefore within the three month period.

We computed the time for filing the petition herein in accordance with the rule herein before stated. Should the court take a different view we ask an extension of time as provided for by Section 8 (a).

POINTS 2 AND 3 OF RESPONDENTS BRIEF (Page 2)

We invite this courts attention to questions raised which, instead of being frivolous, are so well founded that opposing Counsel did not care to argue them.

This case was tried on the pleadings, alone. The complaint alleges, that section 1 of article IV of the state constitution provides that all of the powers of government shall be divided into three departments, to be known as the Executive, Legislative and Judicial; that nowhere in said constitution is a Department of Labor created or permitted (R1); that section 1 of article VI of said constitution provides that the Executive Department of the state shall consist of, a Governor, a Secretary of State, Treasurer of State, Auditor of State and Attorney General. The Section then provides that the General Assembly may provide by law for the establishment of the office of Commissioner of state lands;

That by Section 2 of Chapter 97 Pope's Digest (Act 161 of 1937 the General Assembly attempted to establish a fourth department, called The Department of

Labor, but owing to the constitutional provisions aforesaid act is unconstitutional and void and is in violation of the Federal and State Constitutions as herein after pointed out because a void act is no act and cannot constitute due process.

The complaint alleges that section 5 (a) of the Arkansas Security law violates the equal protection clause of the XIV amendment to the Federal Constitution and also violates the due process clause of said XIV amendment (R 3 and 4);

That Section 5 (2) also violates said XIV amendment (R 4);

That section 6 (4) of said act violates the equal protection of the law provision of the XIV amendment (R 4);

That section 6 (5) of said act violates the equal protection clause of the XIV amendment (R 4 and 5);

That Section 5 (d) (2), section 15 section 6 (2) and Section 6 (4) of said act all violate the XIV amendment to the Federal Constitution (R 5);

That Section 6(m) violates the XIV amendment;

That Section 7(a) violates the XIV amendment (R 5 and 6);

That Section 3(e) of said act violates both the due process and the equal protection clauses of the XIV amendment (R 6 and 7); That said Act 391 is lacking in due process in violation of the XIV amendment because the many unconstitutional provisions found therein leave it so incomplete and unworkable as to render it lacking in the equal protection of the law (R8);

That Act 391 is so dependent on the Labor Department Law (Act 161) that the former is so incomplete and meaningless without the latter as to render it without due process of law (R8);

At pages 57 to 66 our brief in the Arkansas Supreme Court we did argue that in as much as Act 161 which attempts to create a Department of Labor in violation of Articles IV, V, VI and VII of the Arkansas Constitution is void it eliminates from Act 391 the Commissioner of Labor whose office is attempted to be created by said Act 161 thereby leaving Act 391 much of a hol-

low shell and so uncertain indefinite and incomplete as to render it unconstitutional and void.

We did argue at pages 1 to 44 of the State Court brief that Act 161 is unconstitutional and void.

We did argue at pages 66 to 69 of said brief that Section 2 (6) of said Act 161 violates Sections 5 and 6 of Article XVI thereby rendering the entire act void by the express provision of Section 6 of said Article XVI.

We argued at page 69 that Section 5 (a) of Act 391 violates the XIV amendment.

At page 70 of said brief we argued that section 5 (2) of said Act 391 violates the XIV amendment.

At page 71 of said brief we argued that Section 6 (4) of said Act 391 violates the XIV Amendment. At page 73 of said brief we argued that Section 6 (d) of said Act 391 violates the XIV Amendment. At page 74 of said brief we argued that Section 6 (5) of said Act 391 violates the XIV Amendment.

At page 79 we argued that Section 14 (e) of Act 391 violates the XIV Amendment.

The Arkansas Supreme Court does not even mention any of said propositions, leave alone stating its ruling thereon . Of course circumstances alter cases. The rule stated in the several cases cited by opposing counsel may well be applicable to the facts involved in each of those cases.

The theory of petitioners in invoking articles IV, V, VI and VII of the Arkansas Constitution is that the effect of said constitutional provisions is to render both the Labor Department Act and the Security Act void and in legal contemplation non existant.

Certainly counsel for respondents will not contend that an attempt by respondents to collect an unemployment tax for which there is no lawful authority renders such attempt due process of law. If then it is not due process of law respondents are acting in violation of the XIV amendment to the Federal Constitution.

Do counsel contend that absence of law is due process of law?

The Labor Department Act confers powers upon

the Commissioner that clearly make him an executive officer.

In fact Act 391 is bristting with instances where the Commissioner is required to exercise judgment or discretion both of which are executive powers as distinguished from ministerial powers.

Mississippi vs Johnson 4 Wal 475, 98.
Georgia vs Stanton 6 Wal 50.
U. S. vs Lamar 116 U. S. 132.
Decatur vs Paulding 14 Pet 497, 99.
U. S. vs Guthrie 17 How 284
U. S. vs Edmunds 5 Wal 563
Litchfield vs Richards 9 Wal 575,77
Kendall vs U. S. 12 Pet 524
Bartlett vs Kane 16 How 263, 72
U. S. vs Windom 137 U. S. 636
U. S. vs Blaine 139 U. S. 306
U. S. vs Bashaw 152 U. S. 436

There are still other reasons why Federal questions are involved in this case, reasons that arise under the XIV Amendment.

We asked the State Supreme Court to hold that the attempt of respondents to collect the taxes in question is without due process of law, (1) Because Act 161 of 1937 is in violation of Article IV of the Arkansas Constitution. (2) Because Act 391 is so interwoven with Act 161 that unconstitutionality of the former carried the latter down with it. (3) That Section 2 (6) which attempted to make exemptions not embodied in the constitution which by reason of section 6 of Article XVI rendered Act 391 void in its entirety. Not one word is said in the State Court opinion about any of these questions, which if decided in the only way that they can, in reason, be decided leaves the collection of the taxes in question without due process of law, in violation of the XIV Amendment.

The Supreme Court decided not to decide them.

We also contended that various sections of Act 391 violated the XIV amendment as shown at pages 19, 20 and 21 of our original brief.

Again the state supreme court decided not to decide the questions.

POINT IV OF RESPONDENTS BRIEF

As to point 4 of respondent's brief, while it is true that the constitutional questions there mentioned do not in and by themselves constitute Federal questions, it is equally true that if Act 161 of 1937 which attempts to create the Department of Labor is void, then in as much as by section 10 of Act 391 of 1941 there is created in the Department of Labor the Unemployment Security Division to be administered by a full time Director subject to the supervision and direction of the Commissioner of Labor who shall appoint the Director, it results that there can be no Unemployment Security Division in the Department of Labor because there is no Department of Labor by reason of the fact that Act 161 which attempts to create the Department is unconstitutional and void. There can be no commissioner of Labor under Act 161 which is void. There can be no Director because there is no Commissioner to appoint him as is required by Section 10 of Act 391.

What is required to be done by the Director under Act 391 must be left undone. The multitude of Acts which act 391 requires to be done by the Commissioner of Labor must be left undone for want of a Commissioner of Labor whose existance depends solely on void Act 161, which acts to be performed by the Commissioner are enumerated in the petition herein at pages 6 to 9 inclusive.

Opposing counsel do not even attempt to explain to the court what "due process" there is left upon which to predicate the collection of the unemploymet tax the collection of which petitioners seek to enjoin.

We submit that clearly the due process provisions of XIV amendment to the Federal Constitution are being violated. How can it be otherwise when there is no authority in law upon which the respondents can predicate the collection of the tax.

It is therefore glaringly apparent that a meritorious Federal question which has never been presented to or decided by this court is now before this court and the decision of this court upon this new question is invoked.

Article IV is so plain, simple and free from ambiguity that argument as to its meaning seems out of place. It clearly prohibits more than three departments, between which all powers of government are divided. The meaning of Article IV is so unescapable as to leave no room for construction and the Supreme Court of Arkansas refrained from rendering a decision as to its meaning. That court also evaded rendering any decision as to the effect of Article IV upon the validity of the Labor Department Act (Act 161 of 1937) although called upon to do so by the brief in said Arkansas Supreme Court (pages 20 to 57) and again in the petition for rehearing (Point 5 page 3) and the brief in support thereof at pages 6 to 19. When therefore opposing counsel at page say that this court is bound by the decision of the state court concerning the constitutionality of (Act 161 of 1937) we ask where in its opinion did the state court pass on the proposition to which question the inevitable answer must be "Nowhere."

Another answer to the suggestion of counsel is that there is no legitimate reason for the state court to construe Articles IV; it is too plain to admit of construction; that for the state court to say that Article IV does not prohibit a fourth or labor department in addition to the Legislative, Executive and Judicial Departments would be equivalent to saying that black is white. Either statement is too arbitrary and patently in defiance of the facts to receive recognition in judicial proceedings.

As this court in Ward vs Love 253 U. S. 17 at page 22 very appropriately said: "Whether the right was denied or not given due consideration by the supreme court is a question as to which the claimants were entitled to envoke our judgment and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect as by putting forward non-federal grounds of decision which were without any fair or substantial support."

We discuss this question in the original brief where we cite Lawrence vs State 276 U. S. 281, which we submit is controlling upon the question under discussion.

As to the unfair and unsubstantial nature of the state court opinion we invite the attention of this court to what is said in our original brief at pages 1 to 13 inclusive.

The opinion of the state court in discussing Act 391 reads in part (R 19) "It is argued that in as much as the act creates a Department of Labor which is placed under the supervision of an officer designated as the Commissioner of Labor, who is charged with the enforcement of the provisions of the act, that it is violative of the following provisions of our constitution to-wit: Section 1, Article IV; Section 1, Article V; Section 1, Article VI; Article VII and Section 9 of Article XIX."

The fact is as shown by our brief in the state court, a certified copy of which is lodged with the clerk of this court, and a motion embodied in our original brief for leave to file it is that we did not raise the questions referred to by the portion of the opinion above quoted, as to Act 391. We did not raise the question involving Section 9 of Article XIX at any time, in any way as to any act, although the state court proceeded to rule upon it and consumed two or more pages of the opinion in so doing (R 20-23). The other questions were raised as to Act 161 of 1937 but were not passed on by the state court.

Act 391 of 1941 does not attempt to create a Department of Labor.

Section 10 of Act 391.

Act 161 of 1937 does attempt to create the Department of Labor.

Section 2 Chapter 97 Pope's Digest.

Although we filed a petition for a hearing and in it called the courts attention to the fact that Act 391 did not attempt to create a Department of Labor; called the courts attention to the fact that Act 161 of 1937 did attempt to create a Department of Labor and that we in our brief attacked its constitutionality under Articles IV, V, VI and VII for so doing; that we in our brief

pointed out our contention that the exemption provisions of Act 391, by Section 6 of Article XVI rendered the entire act void but that the court did not rule thereon, said Arkansas Supreme Court did not modify its opinion, but overruled said petition.

Careful scruting of the opinion of the Arkansas Supreme Court will disclose to your Honors that specific consideration is given to only two propositions concerning the validity of Act 391, (a) Act 391 does not violate Articles IV, V, VI and VII (b) said Act 391 does not violate Section 9 of Article XIX. As to both of these questions, the court is no doubt, right but the peculiar thing about the situation is that neither of these questions were raised in the case, at any time or in any way. (R 16-23). So far as the opinion is concerned one would think that the court had never heard of Act 161, of 1937.

Many questions were raised as to the violation of both the Federal and State Constitutions but none of these questions are mentioned in the opinion at any time or in any way. Such is the extraordinary, arbitray and evasive character of this opinion.

It certainly is not a judicial adjudication, as it is required to be. Clearly what is said in the Arkansas Court's opinion is obiter dictum and is not binding on this or any other court.

In the case here presented however the Supreme Court of Arkansas has flagrantly violated the XIV Amendment. That amendment applies to all branches of state government, judicial as well as legislative. Chicago Burlington and Iumcy vs Chicago 166 U. S. 226, 33, 4. Virginia vs Rives 100 U. S. 313. Home Insurance Co. vs Los Angeles 227 U. S. 228. Georgia vs Decatur 281 U. S. 505. Mooney vs Hoolaham 294 U. S. 103, 12, 13.

In Traux vs Corrigon 257 U. S. this court at page 324 says: "The facts alleged are admitted by the demurrer and in determining their legal effect as a deprivation of plaintiffs legal rights under the XIV Amendment, we are at as full liberty to consider them as was the state supreme court. ** Nor does the courts declaration that the statute

is a rule of evidence bind us in such an investigation."

Petitioners submit that respondents second and third ground is wholly without merit in that numerous grounds involving Federal questions are raised by the petition and argued; that said grounds are summerized in the subject index following page 17 of the petition.

The provisions of the XIV Amendment are invoked at pages 10, 17, 19, 20 and 23 of petitioners brief and we submit that for the several reasons in said brief discussed it is made to clearly appear that said XIV Amendment is violated in the numerous particulars therein referred to. As to the third ground of said motion we respectfully submit that Articles IV, V, VI and VII of the Arkansas Constitution are so plain, clear and free from ambiguity as not to admit of construction, but unequivacally command that there shall be only three departments of government in the State of Arkansas, and said articles constitute an invulnerable barrier to a fourth department, thereby rendering the Labor Department Act (Act 161 of 1937) unconstitutional and void; that without said act, Act 391 is so meaningless and incomplete as to render it void. With these two acts being void there is no law in the State of Arkansas authorizing the collection of the tax here complained of.

How then can it be said that the collection of said tax is not without due process of law. For want of due process of law the XIV Amendment is clearly violated and said Act 161 of 1937 is void and in the eyes of the law is not a law.

The opinion of the Arkansas Supreme Court is so arbitrary and evasive as not to constitute "due process of law" in violation of the XIV Amendment.

By our original brief pages 20-40 filed in the Arkansas Supreme Court we asked that court to sustain our contention that the Labor Act (Act 161 of 1937) attempting to create a fourth Department of State, called the Department of Labor, was in violation of Article IV and its kindred Articles V, VI, and VII but the court evaded making a ruling upon the question and preferred to rule that the Unemployment Act (Act 391 of

1941) did not violate any of said constitutional provisions and concluded its opinion by saying:

> "In-as-much as we think Act 391 is constitutional, the decree from which is this appeal must be affirmed, and it is so ordered."

We did not contend in the Arkansas courts that Act 391 violated Articles IV, V, VI and VII of the State Constitution. The State Court took great pains to rule that it did not but refused to rule upon our contention that Act 161 of 1937 (The act purporting to create a Department of Labor) did violate said constitutional provisions. The Supreme Court remained silent on the question and although again urged in the petition for rehearing to rule on the question (R 25) the court evaded the question. After referring to Buckstaff Bathhouse Company vs McKinley 198 Ark. 91 and McKinley vs Payne 200 Ark. 1114, the Arkansas Supreme Court says: (R 17)

> "It is argued that neither of the opinions of this court are conclusive of the constitutionality of Act 391 of the Acts of 1941 for the reason that obligations to the constitutionality of Act 391 here raised, were not raised or considered in either of the prior cases arising under act 155 of 1937, and Act 200 of the Acts of 1939.
>
> "This is true and we therefore consider the objections to Act 391 of the Acts of 1941."

As elsewhere stated Act 391 does not attempt to create a Department of Labor, that attempt was made by Act 161 of 1937, which is not mentioned at any time in any place or in any way in the opinion. In short the state court does not pretend to pass upon the constitutionality of Act 161 which clearly violates Article IV of the State Constitution.

The opinion expends three pages (R 20—23) in discussing the question whether Act 391 violates Section 9 of article XIX which is not raised or discussed in the briefs . Without discussing the effect of Articles IV, V, VI and VII upon Act 161 the opinion abruptly and arbitrarily says:

> "In our opinion Act 391 does not offend against any of these provisions." The opinion

concludes: "In as much as we think Act 391 is constitutional the decree from which this appeal must be affirmed and it is so ordered."

POINT 5 OF RESPONDENTS BRIEF AND PART II OF AGRUMENT

Carmichall vs Southern Coal and Coke Company 301 U. S. 495 is a very far reaching decision and covers many questions that might arise in discussing a law to create a fund out of which to pay benefits to unemployed labor. There are however many provisions embodied in the law here involved that are not to be found in the law involved in the Carmichall case. Questions here involved and presented which are not to be found in the Carmichall case are set forth in sub-paragraph 7 of paragraph 28 of the petition herein at pages 11 to 13. To avoid repetition we again invite the attention of the court to said allegations and submit that they constitute a complete answer to what opposing counsel say about the controlling effect of the Carmichall case. In so far as the opinion is in point we have no fault to find with it. We differentiate it however from the case here presented so far as the question of exemptions is concerned. This point of difference arises by reason of sections 5 and 6 of Article XVI of the Arkansas Constitution. This question is presented at page 17 of our original brief herein.

In deciding Buckstaff Bathhouse Company vs McKinley, Commissioner 308 U. S. 358 this court gave no consideration to any constitutional question, as appears from page 361 of the opinion where this court says:

> "The Supreme Court of Arkansas affirmed a decree sustaining a demurrer to the bill and dismissing it on the ground that the Arkansas Statute was applicable to petitioner and that presentation of the acts in question petitioner did not set up the claimed immunity. We granted certiorari because the decision was asserted to be repugnant to the acts vesting exclusive jurisdiction over the Hot Springs reservation in the United States. We agree with the Supreme Court of Arkansas that the State has jurisdiction to impose the tax in question."

We submit that said case is not even remotely in point, on any question involved in the case here presented. We discuss the state court decision of that case found in 198 Arkansas 91 at pages 9 to 12 of the brief herein in support of the petition to which the attention of this court is again specially invited. As we point out at page 10 the opinion specifies the questions before the court for decision but mentions no constitutional question. The court even says that the constitutionality of the act is not directly questioned on the appeal.

If this court will compare the points shown in the subject index immediately following pages 17 of the petition with the paragraphs of the syllabli in the Carmichall case as set forth at page 8-9 of opposing counsels brief it will be readily noted that the Carmichall case does not cover any of the points raised by the petition herein.

While at first blush the contrary may seem to be true as to paragraph 7 of said syllabli, scrutiny will readily disclose that the point raised as to exemptions is founded upon specific and ironclad provisions embodied in sections 5 and 6 of article XVI of the Arkansas Constitution and leaves the point covered by point 7 of the syllabi in no wise pertinent. This will appear from pages 17-19 of our brief which covers 2(6) of Act 391, and relates to the subject of exemptions.

Section 5 of said Article XVI fixes exemptions from taxation and section 6 arrogates unto the constitution the sale function of exemptions from taxation and renders any act that attempts to create other exemptions absolutely void.

PART I OF RESPONDENTS ARGUMENT

Counsel for respondents at page 7 to 12 of his brief herein tells this court that you are bound by the decisions of the state court concerning any of the state court constitutional questions thereby leaving respondent without a hearing and rendering the state court proceedings in violation of the XIV Amendment. But where are the decisions of the state court that this court is bound to follow? Counsel does not point them out.

We cannot find them in the state court opinion,

(R 16 to 23) and if this court can find them we will be greatly surprised.

> This court in Lawrence vs State 276 U. S. 276 U. S. 281 says: "But the constitution which guarantees rights and immunities to the citizens likewise insures him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds it is the province of this court to inquire whether the decision rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."

We submit that this case comes fairly within the four corners of the case from which we have just quoted. Petitioners pray this court to grant them a hearing and pass upon the questions which the court refused to decide.

This court is free and unhampered by any state court decision except the two hereinafter referred to and may treat the questions as of first impression.

Stated as it is, without limitation or qualification, the language employed is not correct, as is evidenced for instance, by one of the cases cited by counsel—Tampa Water Works Co. vs. Tampa 199 U. S. 241 where this court states the true rule as follows:

"The Federal Supreme Court has no power to review a decision of a state court which puts upon a state statute a construction which removes every question of the constitutionality from it, *and seems to us reasonable* if a somewhat different one could be conceived." (The italics are ours)

Other limitations on the rule as stated by counsel are, that to be binding on the Federal Court the state court decision must not be arbitrary or evasive and must rest upon a fair and substantial basis. Cases bearing upon this subject are cited and quoted from in our brief at pages 14 and 15 where a number of cases are referred to.

In Siler vs Louisville & Nashville RR Co. 213 U. S.

175 this court in passing upon the constitutionality of an act which it was claimed did not constitute due process of law at page 194 said: "In this case we are without the benefit of a construction of the statute by the highest court of Kentucky, and we must proceed in the absence of state adjudication upon the subject. Nevertheless, we are compelled to the belief that the statute does not grant to the Commissioner any such great and extensive power as it has assumed to exercise in making the order in question." This is precisely the position in which this court now finds itself.

In the case here presented this court is called upon to determine whether Act 161 of 1937 constitutes due process and that question hinges upon the constitutionality of that act from the viewpoint of Article IV of the Arkansas Constitution. The state supreme court refused to consider the question thereby leaving it to this court to make its own ruling on the question as was done in the case from which we have just quoted.

Except for the two decisions referred to elsewhere this court is without the benefit of the opinion of the Arkansas Supreme Court and must proceed to initiate your own opinion, upon the constitutionality of Acts 161 and 391.

In Schuylkill Trust Co. vs Pennsylvania 296 U. S. 113 this court at page 119 said: "The appellee relies upon the statement of the Supreme Court of Pennsylvania that the levy is upon the shares and not upon assets. The appellant asks us to find to the contrary. We give great weight to the characterization of a tax or the interpretation of a state law eminating from the highest court of the State, but where a Federal question is involved we are not bound by the label attached to the tax or the character ascribed to the law. We must determine for ourselves the true nature of the tax by ascertaining its operation and effect."

To the same effect is Senior vs Braden 295 U. S. 422, 9.

In Great Northern Railway vs Washington 300 U. S. 154 this court in quoting approvingly from Norris

vs Alabama 294 U. S. 587, says:

> "When a Federal right has been specially set up and claimed in a state court, it is our province to inquire, not merely whether it was denied in express terms, but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Other wise, review by this court would fail of its purpose in safeguarding constitutional rights.
>
> "Thus, whenever a conclusion of law of a state court as to a Federal right and findings of fact are so intermingled that the later control the former, it is encumbent upon us to analyze the facts in order that the appropriate enforcement of the Fedeal right may be assured."

Other cases of similar import are, Johnson Oil Co. vs Oklahoma 290 U. S. 158, 9. Beidler vs South Carolina Tax. Com. 282 U. S. 1. Smith vs. Cahoon 283 U. S. 553. Cumberland Coal Co. vs. Board 284 U. S. 23, 8.

In Union Pacific vs Pub. Service Com. 248 U. S. it was charged that certain exactions from railroad company were an interference with Interstate Commerce. The Supreme Court of the state avoided the question by holding that the payment was voluntary. And it was argued that such decision excluded the jurisdiction of this court. At page 69 this court said:

But the later decisions show that such is not the law and on the contrary it is the duty of this court to examine for itself whether there is any basis in the admitted facts or in the evidence when the facts are in dispute, for a finding that the federal right has been waived. Creswill vs Knights of Pythias 225 U. S. 246. Were it otherwise as conduct under duress involves a choice, it always would be possible for a state to impose an unconstitutional burdens by the threat of penalties worse than in case of a failure to accept it and then declare the acceptance voluntary as was attempted in Atchison, Topeka and Santa Fe Ry Co. vs. O'Conner 223 U. S. 280.

In the case here presented the state court evaded

passing upon a controlling question, that of the violation of Article IV of the State Constitution by Act 161 of 1937, and substituted for such ruling a ruling that Act 391 was not in conflict with Article IV. This makes it necessary for this court to accept the state court decisions in Martin vs State 60 Ark. 343 and Stanley vs. Gates 179 Ark. 897 as controlling and holding as they do that there can be only three departments and only such as are defined by the constitution or else this court must rule upon the question which the State Court evaded. Such ruling by this open minded court will be easy because the language of Article IV is so clear and unmistakable as to require no construction but only reading. The two cases last cited are quoted from at pages 6, 7 and 8 of our brief herein.

In Enterprise Irrigation Dist. vs Canal Co. 243 U. S. this court at page 164 said: "But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. ****** and this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere devise to prevent a review of the decision upon the federal question."

In Stanley County vs Caler 190 U. S. this court at page 444 in reference to decisions determining the right of property says:

> "But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment; as they also always do in reference to the doctrines of Commercial law and general jurisprudence."

There is no decision of the Arkansas Supreme Court upon the proposition that Act 161 of 1937 violates Article IV of the State Constitution. Said Act attempts to create a Department of Labor.

There are decisions, State vs Martin 60 Ark. 343 and Stanley vs Gates 179 Ark. 897 cited at pages 26, 27 and 29 of the State Court brief, stating the force of Article IV, as heretofore pointed out at pages 6, 7 and

8 of our original brief. These decisions we would be glad to have this court follow. The State Supreme Court evaded doing so, but instead it devoted several pages of its opinion to the propostion that Act 391 does not violate Section 1 of Article IV Section 1 of Article V, Section 1 of Article VII, a question which was not before the court also; that said act does not violate Section 9 of Article XIX, another question which was not before the court. (R 19-23) nor does Act 391 create an administrative agency as recited in the opinion (R 20), nor does it create any kind of an agency. The creating is left which created a department as distinguished from an agency to Act 161, Counsel for respondents tell you that you are bound to follow this opinion. This court has held in Lawrence vs State Supra and in many other cases, some of which we have vited herein has repeatedly stated that the Federal Constitution which guarantees rights and immunities likewise insures the citizen the privilege of having said rights judicially declared and even though the claimed constitutional rights are denied on non-federal grounds it is the province of this court to determine whether the decisions is evasive, arbitrary or rests upon unsubstantial grounds.

We submit that the opinion here involved is obviously evasive, arbitrary and unsubstantial.

These last two cases leave no doubt as to the power and duty of this court, upon the record here presented. Unless the two cases above cited settle the law it is the right and duty of this court to exercise your own judgment and settle it.

We have no doubt that learned counsel have brought forward all that can be said in opposition to the petition filed herein, but has necessarily left petitioners right to a hearing and reversal beyond question.

Wherefor petitioners again ask that the prayer of said petition be granted.

CHARLES M. HAFT,
Attorney for Petitioners